



REPUBLIC OF KENYA

High Court at Eldoret

Miscellaneous Civil Application 142 of 2002

IN THE MATTER OF THE LAW REFORM ACT, CAP 26 LAWS OF KENYA

AND

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

UASIN GISHU LAND DISPUTES TRIBUNAL- SOY DIVISION.....1ST RESPONDENT

CHRISTOPHER KIPKIRONG MUREY.....2ND RESPONDENT

EX PARTE:

SAMUEL KIPLETING CHERES

JUDGEMENT

Pursuant to leave granted on 6th June 2002 ex parte Applicant one Samwel Kipleting Cheres filed a notice of motion dated 20th June 2002 seeking the following relief:

That an order of certiorari does issue to remove into this Honourable Court and quash the decision of the Uasin Gishu Land Disputes Tribunal Soy Division in Tribunal Cause No. 62 of 2000 between CHRISTOPHER KIPKIRONG MUREY and SAMWEL KIPLETING CHERES together with adoption and decree dated 10th April 2002 emanating therefrom issued in Eldoret CMCC No. 17 of 2002.

The application was founded on the grounds that in s far as the same can be discerned from the statement:

- i. That the Applicant has never been the owner of land parcel known as Soy/Kapsang/52.
- ii. That there is no parcel of land registered as Soy/Kapsang/52.
- iii. That the only parcel known to the Applicant is parcel No. L.R. 7512 registered in the name of Kipchoge Arap Kerich which the 2nd Respondent alleged that it was subdivided into portions and that parcel Soy/Kapsang/52 was part of it.

- iv. That the said Kipchoge Arap Kerich died on 26th August 1985.
- v. That the personal representative of the said Kipchoge Arap Kerich to wit Noah Kibii Choge also died on 5th May 1997 and since then there was no personal representative of the estate to date.
- vi. That the issues in controversy are essentially issues of succession into which the Tribunal has no powers to enquire, and hence the Tribunal acted *ultra vires* the provisions of Land Disputes Act 1990 and in contravention of the Law of Succession Act, Cap 160 Laws of Kenya.
- vii. The Applicant therefore cannot execute any transfer in favour of the 2nd Respondent as ordered by the Tribunal as he is neither the registered owner nor the personal representative of the registered owner.
- viii. That if at all parcel LR No. 7512 was subdivided as alleged, the new parcels have never been registered nor the title to LR No. 7512 cancelled.

The 1st Respondent filed grounds of opposition dated 11th March 2003. It contended that the application is fatally defective; the application is incompetent; the Applicant has no *locus standi*; the suit is bad in law; the suit is ill-advised and misconceived; and that the suit is an abuse of the court process. The 2nd Respondent filed a replying affidavit on 4th October 2002. He contends that the award was within the jurisdiction of the Land Disputes Tribunal. That he had been allocated 40 acres of land in Kipsang Farm and that he has lived there from 1978. THAT the parcel of land known as LR 7512 was a large farm with many people who had purchased various portions of different sizes. That the parcel of land had been subdivided by the surveyors so as to provide for each individual owner and also provide for public utilities on the said farm. That what was remaining was the issuance of titles. That although the surveyors identified each individual parcel on the ground, the ex parte Applicant trespassed onto his portion of 35 acres prompting him to institute the claim in the land disputes tribunal. That the tribunal was properly within its jurisdiction to determine that the Respondent was entitled to his 35 acres of land. That the succession proceedings were only raised to curtail the 2nd Respondent's rights as the ex parte Applicant had trespassed onto his land.

The decision of the 1st Respondent was as follows:

“That the plaintiff CHRISTOPHER KIPKIRONG MUREI is awarded 35 acres as shown in the map sheet and continue to develop it.”

Counsel for the ex parte Applicant and the 2nd Respondent made oral submissions during hearing of the main motion. The State Counsel for the 1st Respondent was served but it did not attend. The main issue as submitted by counsel for ex parte Applicant was whether the 1st Respondent could adjudicate upon the issue of ownership of parcel of land between the parties when neither of them was the registered owner and when the registered owner had passed away. Counsel submitted that LR No. 7512 was registered in the name of Jacob Kapchoge Arap Kerich. That the land had not been sub-divided. Therefore Soy/Kapsang/52 does not exist. That Jacob is deceased and the administrator to his estate is also deceased. That he decree is unenforceable. He asked court to quash the decision as illegal.

Counsel for the 2nd Respondent opposed the motion. He submitted that Jacob Kipchoge Arap Kerich died in 1985. Letter of administration was obtained and the Administrator applied to the Moiben Land Control Board to carve out the land comprising 1000 acres into 75 portions of different acreage and public utility such as 1 school, 1 dip and 1 dam. This was done on 12.02.1996. That consent to subdivide was issued. That the land was subdivided and the district surveyor wrote letter demanding survey fees from the beneficiaries. What was pending was issuance of titles. He submitted that he tribunal had powers to deal with occupation of land. That the award was legal and that in 2003 titles were issued

I have considered the rival submissions of counsel and the issue for determination is simply whether the

Tribunal acted within its jurisdiction. The ex parte Applicant contends that the issue before the Tribunal was ownership of land but the 2nd Respondent contends that it was trespass to land or occupation of land. Section 3 of the Land disputes Tribunal Act (as it then was) provide as follows:

Subject to this Act, all cases of a civil nature involving a dispute as to—

- a) the division of, or the determination of boundaries to land, including land held in common;***
- b) a claim to work or occupy land; or***
- c) trespass to land shall be heard and determined by a Tribunal established under section 4.***

I have considered the evidence on record, consent to subdivide the land was issued at Land Control board meeting held on 22/2/1996 (CKM4). Through letter of 10th July 2002 the District Surveyor confirmed that the subdivision plan for LR No. 7512 had been approved (CKM5). The 2nd Respondent is amongst one of the beneficiaries listed as owning land in Kapsang farm as per CKM6. This is a letter dated 15th June 1994. The acreage of the 2nd Respondent is given as 34.3775. The ex parte Applicant depones that the administrator Noah Kibii Kipchoge died on 5th May 1997. By this time he had already submitted the application for consent to subdivide the land and obtained consent. The office of the surveyor was communicating through the secretary of Kapsang Farm. The Tribunal made an award that the 35 acres are awarded to the 2nd Respondent as shown in the map sheet. This to me was not awarding anything but simply interpreting a map. To determine trespass a map must be interpreted. The use of the word 'award' did not mean a determination of ownership. The surveyor had already forwarded the names of beneficiaries of the plots and as per exhibit "CKM5" all that was pending was issue of title deeds.

I have considered the grounds upon which relief is sought and I am of the view that the Notice of Motion must fail for lacking merit. The award by the 1st Respondent is only declaratory and does not enjoin the ex parte Applicant to transfer anything to the 2nd Respondent. The court was informed that titles were issued in 2003 and therefore the 2nd Respondent has title over the 35 acres. An Order of Certiorari will not issue where the tribunal exercises power *intra vires* and commits no breach of natural justice. The Succession Proceedings are neither here nor there. The administrator subdivided the land when he was still alive. The entitlement of the beneficiaries was certain.

For these reasons the notice of motion dated 20th June 2002 is hereby dismissed with costs to the 2nd Respondent. It is so ordered.

DATED AND SIGNED AT NAIROBI ON THIS 9TH DAY OF AUGUST 2012

M. K. IBRAHIM

JUDGE

DATED AND DELIVERED AT ELDORET ON THIS 17TH DAY OF OCTOBER 2012

F. AZANGALALA

JUDGE

In the presence of: Ms Khaya for Applicant

Mr. Ngetich h/b for Mr. Birech for 1st Respondent

Mr. Ngumbi for 2nd Respondent